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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 486

VULCAN MATERIALS COMPANY,
Petitioner,

vs.

ERNEST J. SAUBER, DISTRICT DIRECTOR OF INTERNAL REVENUE AND D. J. LUIPPOLD, ACTING DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Vulcan Materials Company, a New Jersey corporation, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this cause.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit printed in Appendix A hereto (*infra*, pages 19 to 31) is not yet officially reported but appears in full in 62-2 USTC 9586.

The findings of fact and conclusions of law of the District Court (pages 143-149 of the Appendix in the Court of Appeals, and filed herewith) are reported in 61-1 USTC 9370.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on June 25, 1962 (Appendix A, *infra*, page 19). A petition for rehearing timely filed was denied on July 27, 1962 (Appendix A, *infra*, page 31).

The jurisdiction of this Court is invoked under the provisions of 28 USC, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether by the use of the word "grade" in the 1951 Amendment to the Internal Revenue Code of 1939 (26 USC 114(b)(4)(A), 1952 ed., 65 Stat. 497 relating to percentage depletion for non-metallic minerals) Congress implicitly included a quality test as well as one based on chemical composition, and, if so, whether the Court of Appeals for the Seventh Circuit in its decision in this case erred in failing to take into account that quality test.

2. Whether the Court of Appeals was too greatly influenced by two aspects of the legislative history of the statute but failed to take adequate cognizance of a third portion of that history.

3. Whether the terms "chemical grade limestone" and "metallurgical grade limestone" incorporated in the statute had any "commonly understood commercial meaning" prior to the adoption of the statute, and if not whether the Court of Appeals in its decision in this case erred in applying the "commonly understood commercial meaning" standard which is not found in the statute or in any

committee report in which the House of Representatives or its Committee on Ways and Means concurred.

4. Whether "dolomite", factually a limestone, may in law be held *not* to be a limestone.

THE STATUTE AND REGULATIONS INVOLVED

The statutory provisions involved are 26 U. S. C. 114(b)(4)(A) 1952 ed.; 65 Stat. 497 set forth in Appendix A, pages 31 to 33.

The Treasury regulations involved are set forth in Appendix B, pages 34 to 37.

STATEMENT OF THE CASE

This is an appeal from a decision of the District Court as to the proper rate of depletion to be allowed the taxpayer in the years 1951 and 1952 under Section 114(b)(4)(A) of the 1939 Internal Revenue Code, in a suit for refund of income taxes alleged to have been erroneously assessed against plaintiff. Jurisdiction of the District Court is based upon Section 1340 of Title 28 of the United States Code as amended. There is no question that Taxpayer is entitled to some refund. The dispute is as to the amount.

Petitioner (Taxpayer), Vulcan Materials Company, a New Jersey corporation doing business in Illinois, is the successor by merger to Consumers Company, the original taxpayer.

In its income tax returns for the years 1951 and 1952 Taxpayer claimed a depletion deduction of 15% of all sales from quarries owned by it at three locations, one near Racine, Wisconsin, one at McCook, Illinois, and the third at Bellwood, Illinois. The Respondent District Director (the Government) upon an audit of the returns allowed

depletion rates of 15%, 10% and 5%, depending upon the actual use to which the quarried stone was put—the so-called end-use rule. Taxpayer paid the deficiency assessments asserted and filed suit in the District Court for a refund of $383,341.67 plus interest.

The parties stipulated that the chemical analyses of the stone from each of the quarries for the years in question reveal the following mineral content:

	McCook	Racine	Bellwood
Magnesium carbonate	43%	43%	40%
Calcium carbonate	55%	55%	53%
Impurities	2%	2%	7%

that the stone from all the quarries was dolomite and that the McCook and Racine stone was commonly known as such; that the stone from the McCook and Racine quarries was suitable for use in the chemical and metallurgical industries, but that the stone from the Bellwood quarry was not suitable for use in the chemical and metallurgical industries. Actual use by such industries was shown by a list of sales, including tonnages and amounts, included in the stipulation.

In its tax returns and in the proceeding in the District Court, Taxpayer claimed that the stone from all three quarries met the requirements of metallurgical grade limestone and was, therefore, entitled to a 15% depletion rate.

The District Court held that the mineral deposits at McCook and Racine were dolomite within the meaning of Section 114(b)(4)(A) of the Internal Revenue Code of 1939, were not chemical or metallurgical grade limestone, and that Taxpayer was entitled to a 10% depletion allowance for stone sold from the McCook and Racine quarries; that the deposit at Bellwood was stone and not dolomite or chemical or metallurgical grade limestone within the commonly understood commercial meaning and that Tax-

payer was entitled only to 5% depletion for stone from its Bellwood quarry. The District Court further held that inasmuch as the Commissioner had employed the "end-use" test in determing the depletion allowance, Taxpayer was entitled to a refund of $100,210.11.

In its appeal to the Court of Appeals for the Seventh Circuit, Taxpayer conceded that the stone from the Bellwood quarry did not meet the requirements of metallurgical grade limestone, but claimed that this stone was dolomite and hence entitled to a 10% depletion allowance. As to the McCook and Racine stone, Taxpayer contended, and contends now, that limestones are divided into two broad classifications, calcium carbonates and magnesium carbonates; that when the content of magnesium carbonate predominates, the stone is known as dolomite, being a particular kind of limestone; that calcium carbonate limestone and magnesium carbonate limestone (dolomite) range in "grade" from large amounts of impurities to almost no impurities; that there is no common commercial understanding of the terms "chemical grade limestone" and "metallurgical grade limestone" used in the statute but that these terms are more specific than the term "dolomite" because they refer to high purity carbonate stone, suitable for use in the chemical and metallurgical industries; and that since dolomite is a limestone, Taxpayer's McCook and Racine dolomite, which by stipulation was suitable for and used by the chemical and metallurgical industries, is chemical and metallurgical grade limestone and entitled to a 15% depletion allowance.

The Court of Appeals for the Seventh Circuit held that the stone from the McCook and Racine quarries was dolomite, and was commonly known as such; that since Congress did not provide a classification for chemical or metallurgical grade dolomite to cover situations such as we have here, where dolomite is sufficiently pure to be suit-

able for use in the metallurgical industry, the specific provision for dolomite sets the upper limit for the percentage depletion allowance for that stone, and the McCook and Racine stone, therefore, was entitled to no more than the 10% depletion allowance allotted to that stone by the District Court.

As to the Bellwood stone, however, the Court of Appeals expressed itself in particular agreement with Judge Weick's views in *Erie Stone Co.* v. *United States*, 6th Cir., 304 F. 2d 331, 9 A. F. T. R. 2d 1543, 62-2 USTC 9512 that the statute does not distinguish between high and low grade dolomite—either grade is entitled to a 10% depletion allowance—and that the amount of impurities contained in a stone which is otherwise dolomite according to the recognized scientific and commercially accepted tests, is irrelevant. The Court of Appeals, therefore, held that the Bellwood stone should be classified as dolomite and allowed a 10% depletion rate. The judgment of the District Court was affirmed in part and reversed in part, and the proceeding was remanded for the purpose of entering judgment consistent with its opinion.

REASONS FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT.

The Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decision of another court of appeals on the same question (*United States* v. *Wagner Quarries Co.*, 260 F. 2d 907, 6th Cir. 1958) and decided an important question of federal law which has not been, but should be, settled by this Court. Involved is the proper construction of a federal income tax statute, 26 U. S. C. 114(b)(4)(A) 1952 ed., 65 Stat. 497); dealing with percentage depletion allowed for certain natural mineral deposits which (eliminating other metals and min-

erals not in question in this proceeding) are enumerated in the statute thus:

> "(i) * * * stone * * * 5 per centum,
> "(ii) * * * dolomite, magnesite * * * calcium carbonates and magnesium carbonates, 10 per centum.
> "(iii) * * * metallurgical grade limestone, chemical grade limestone * * * 15 per centum,"
>
> * * * * *
>
> "of the gross income from the property during the taxable year." (Appendix A, page 20.)

In deciding this question, the Court below found the decision of the Court of Appeals for the Sixth Circuit in *The Erie Stone Company* v. *United States of America*, 304 F. 2d 331, 9 A. F. T. R. 2d 1543, 62-2 USTC 9512 (in which a petition for certiorari has been filed in this Court) to be support for its conclusion that dolomite is dolomite, and that the statute does not distinguish between high and low grade dolomite—it is all entitled to a 10% depletion allowance (see the Seventh Circuit's approval of the reasoning in *Halquist* v. *Commissioner*, 33 T. C. 304, 322, Appendix A, page 26). Yet the same opinion also quotes with approval the language of Judge McAllister in the *Erie Stone* case that "Many dolomites are marbles and are entitled to only a 5% depletion allowance, although a dolomite which is not a marble is entitled to a 10% depletion allowance according to the statute" (Appendix A, page 30).

If a low grade dolomite which is a marble is entitled only to a 5% depletion allowance under the statute it is apparent that Congress did overlap the term "dolomite." How then can it be said that there can be no overlap at the 15% end of the scale? Or that we cannot assume that Congress did not intend to include a high grade dolomite within the classification "chemical or metallurgical grade

limestone" when it specifically granted a 10% rate to "dolomite"?

The same Judge McAllister in another part of his lengthy and well reasoned opinion which is set forth in full in the petition for certiorari filed in this Court in *The Erie Stone Company* v. *United States*, No. 388, recognized this overlapping.

Judge McAllister's opinion on the question of whether taxpayer's dolomite in the *Erie Stone* case was also chemical and metallurgical grade limestone regrettably was not the majority opinion. Two of the judges in that case simply agreed that the same District Judge who decided *Wagner Quarries Co.* v. *United States*, 154 F. Supp. 655, 659-662 (affirmed by the Sixth Circuit in 260 F. 2d 907) was correct in distinguishing the *Erie* case from the *Wagner* case and concluded that the Erie stone (except as to one quarry) was "dolomite." It should be noted that one of the two Judges who disagreed with Judge McAllister on the question of whether the *Erie* stone was chemical and metallurgical grade limestone agreed with him that the "No. 63 limestone" was dolomite, and the District Court has been reversed on that point in the *Erie* case. A (if not *the*) controlling factor in the District Court's decision in the *Erie* case (181 F. Supp. 942, 946, 60-1 USTC 9346) was that there was no adequate proof of suitability for use and no proof of actual use by the chemical and metallurgical industries. The District Judge distinguished the *Erie* case from the *Wagner* case because "in the cases before us" (*Erie*) "there is no evidence that the product of taxpayer's quarries was inviting to the metallurgical and chemical industries." It said, therefore, that it could not conclude that the Erie product was "capable of use for metallurgical or chemical purposes" within the terms of the definition laid down by the Court of Appeals in *Wagner Quarries Company* v. *United States*, 260 F. 2d 907.

To the extent, then, that the decisions in *Wagner* and *Erie* turn on the question of proof of suitability for, and actual use in the chemical and metallurgical industries in *Wagner*, and lack of such proof in *Erie*, there is conflict of decisions between the Sixth and Seventh Circuits, for the Seventh Circuit in its opinion ignored the fact that taxpayer's McCook and Racine stone, by stipulation was suitable for use, and was actually used, by those industries.

Fundamentally, the important question of federal law to be decided is "If 'dolomite' is in fact a limestone, may it in law be held not to be a limestone?" Because if it is a limestone, then from the legislative history of this Statute, Sec. 114(b)(4)(A) of the Internal Revenue Code of 1939, as amended by the Revenue Act of 1951, and the format of the Statute, it must be concluded that taxpayer's McCook and Racine quarries produced chemical and metallurgical grade limestone, entitled to 15% depletion in the years 1951 and 1952.

In the opinion of the Court below we find several serious errors and inconsistencies.

First: It has held that while it is true that the statute contains no definition of the mineral terms therein listed, its legislative history indicates the meaning which Congress intended to attach to them. It quotes with approval the language from the Report of the Senate Finance Committee (Appendix C, page 38) which it says "added the provisions now contained in paragraphs (i), (ii) and (iii) of Section 114(b)(4)(A)" (Appendix A, 31). "The names of all the various enumerated minerals are of course intended to have their commonly understood commercial meaning." The Senate Finance Committee did not add the provisions for "chemical grade limestone" and "metallurgical grade limestone." Those provisions were included in the Revenue Bill of 1950 which was introduced at the

instance of the Ways and Means Committee of the House of Representatives, 81st Congress, Second Session, after it had heard the testimony of Dr. Kenneth K. Landes and had incorporated in the report of its hearings a copy of a monograph written by Dr. Landes entitled "Metallurgical Limestone Reserves in the United States." This monograph appears as Plaintiff's Exhibit No. 6, Appellant's Appendix in the United States Court of Appeals, pages 114 to 120.

The Revenue Bill of 1950, introduced at the 81st Congress, ultimately became the Revenue Bill of 1951 adopted by the 82nd Congress.

In Dr. Landes' introduction to his topic he said, "In this report 'limestone' will be used *as in industry* for both limestone and dolomite" (emphasis supplied) and he proceeded to classify limestones that are satisfactory for metallurgical or chemical uses into four grades. If the Court understands, in reading Dr. Landes' classifications (page 116 of Appellant's Appendix in the Court of Appeals) that he was writing of calcined products; that the percentages given must, therefore, be multiplied (approximately) by 2 to allow for elimination of the water content by calcination; and that the fifth element which he did not mention in his tables is calcium, it will be seen that his *grades* B-1 and B-2 are restated thus:

	B-1	B-2
silica	2.0%	4.0%
alumina	3.0%	3.0%
sulphur	0.2%	0.2%
magnesia	43.6%	43.6%
calcium	51.2%	49.2%

Dr. Landes' *grades* B-1 and B-2 *limestone* satisfactory for metallurgical or chemical use, therefore, are not as pure

as taxpayer's McCook and Racine stone but nearly parallel as to the proportions of magnesia and calcium.

In his testimony before the Ways and Means Committee (Plaintiff's Ex. No. 5, Appellant's Appendix in the Court of Appeals, pages 113 and 114) Dr. Landes and his interrogator used the terms "high grade limestone," "metallurgical stone," "limestone" and "dolomite" interchangeably.

The Senate Finance Committee did not, therefore, add the terms "chemical grade limestone" and "metallurgical grade limestone." In its report it adopted those terms from the House Bill but reduced the depletion rate from 15% to 10% because of a feared loss in revenue and added at the 10% rate "the magnesium compounds, magnesite, dolomite and brucite" (Appendix C, page 38).

The Conference Report on the Proposed Revenue Act of 1951 set forth the three categories (i), (ii) and (iii) which appear in the Statute. Nowhere in the enumeration does the word "limestone" stand aloof, yet "limestone" is stone (i); even the Government concedes it to be a calcium carbonate (ii) although denying that it is also a magnesium carbonate; and it can be and is of chemical and metallurgical grades (iii). Dolomite concededly is a magnesium carbonate; so is magnesite. There is duplication in (ii). When, therefore, the Conference Committee included in its report the other controversial statement that has troubled the taxpayers, the Government and the Courts ever since,

> "It is intended in any case where a mineral is specifically provided for at a stated rate of percentage allowance, that the specific provision will govern over the allowance provided (whether higher or lower) for a more general classification."

it cannot be said that the terms used were so specific that the meaning and intent of Congress can be determined

without reference to the classification used—(i) low grade 5%; (ii) medium grade 10%; (iii) high grade 15%.

Second: The Court of Appeals has found that since the McCook and Racine stone was dolomite and was commonly known as such, it was entitled to no more than the 10% depletion allowance allotted to it by the District Court. It thus adopted the District Court's finding that dolomite and chemical or metallurgical grade limestone are separate and distinct rocks. As support, it cites the testimony of a witness who the Court says was "called by the taxpayer." That is an error. The witness whose testimony the Court of Appeals quotes was Dr. William E. Ham, a geologist called by the Government and the quotation is from page 105 of Appellant's Appendix in the Court of Appeals. The Court admits the evidence supporting its findings is "conflicting in many respects." Quite apparently the Court was confused by the conflict. Even in the portion of Dr. Ham's testimony which the Court quoted in the mistaken belief he was taxpayer's witness, he says: "in the broadest sense dolomite can be a kind of limestone."

There is no better evidence that commercially and commonly dolomite *is* known as limestone than that the *name* of the taxpayer in the first case decided under this Sec. 114(b)(4)(A) was Virginian *Limestone* Corp., (26 T. C. 553), whereas the *product* of that taxpayer was dolomite; or that substantial tonnage of rock quarried by Taxpayer in this case—all of which the Court of Appeals has found, and the parties stipulated to be "dolomite"—was sold as agricultural *limestone*, under the Agricultural Conservation Program of the United States Department of Agriculture; or, going to *Erie Stone* v. *United States*, 304 F. 2nd 331, 9 A. F. T. R. 2d 1543, 62-2 USTC 9512, pending in this Court on certiorari, that the product of the taxpayer's poorest quarry, which the Seventh Circuit has found to be

"dolomite" was referred to by its producer (and by Judge McAllister) as No. 63 limestone.

We respectfully direct the Court's attention also to Plaintiff's Exhibit No. 3, Appellant's Appendix in the Court of Appeals, Page 111, a price list of Michigan *Limestone* Division of United States Steel Corporation which quotes its price, under the heading "Dolomitic Limestone", metallurgical grade, at $1.50 N. T., F. O. B. Port *Dolomite*, for the same kind of blast furnace flux which United States Steel purchased from Taxpayer in 1951 and 1952 (stipulation, same abstract, pages 16 and 17). By contrast, "High Calcium Limestone", blast furnace flux, is quoted at only $1.05 G. T., F. O. B. Port *Calcite*. Two different kinds of high grade limestone (one a dolomite) are found at different locations.

With one exception—the Government's witness, Joseph Berman—all the evidence in this case is unanimous that dolomite *is* a form of *limestone*. His views were expressly held by the Court in *Blue Ridge Stone Corporation* v. *United States*, 170 Fed. Supp. 569) to be in conflict with the Tax Court (*Virginia Limestone Corp.* v. *Commissioner*, 26 T. C. 553) and with stated Congressional intent, and hence not to be considered decisive. Although given overnight to produce some authority to support his statement (that there are authorities holding that dolomite is not a limestone) he could not.

A very recent decision by the United States Court of Claims on May 9, 1962, *The H. Frazier Company, Inc.* v. *The United States*, 302 F. 2nd 521; 62-1 USTC 9464, defines limestone as any rock containing at least 50% of calcium carbonate. The Government's own regulation, Rev. Rul. 57-288 (Appendix B, page 37) adopted in 1957 designated any *limestone* rock with 35% magnesium or higher, as dolomite. It was not until December 1, 1960, when T. D.

6510 was filed (Appendix B, page 34), that the regulation was changed to exclude dolomite from the Government's definition of limestone.

This recent regulation, adopted after this case was tried, is no support for the Government's position that limestone and dolomite are separate and distinct rocks (*Haggar Co. v. Helvering*, 308 U. S. 389, 394, 395, *Merritt v. Cameron*, 137 U. S. 542, 551, 552, *Burnet, Commissioner v. Chicago Portrait Co.*, 285 U. S. 1, 16.) There is also ample authority that the finding of the District Court upholding the Government on this point (like its finding that Bellwood was 5% stone and not 10% dolomite, which has been reversed by the Court of Appeals) is in reality a conclusion of law which is not binding upon the Appellate Court. (*Bogardus v. Commissioner*, 302 U. S. 34, 38, 39, *Baumgartner v. United States*, 322 U. S. 665, 670, 671, *Soy Food Mills, Inc. v. Pillsbury Mills, Inc.*, 161 F. 2nd, 22, *Cordovan Associates, Inc. v. Dayton Rubber Co.*, 290 F. 2nd 858, 860.)

Third: By failing to realize that the House of Representatives and not the Senate introduced the statutory terms "chemical grade limestone" and "metallurgical grade limestone" and that dolomite is commonly and commercially called, and understood to be, limestone, the Court of Appeals has ignored the very beginning of the legislative history of Sec. 114(b)(4)(A)—the testimony and monograph of Dr. Kenneth K. Landes—and has drawn a legal conclusion as to "common, commercial understanding" which the facts do not support. Before we can conclude that "common, commercial understanding" governs the meaning of "chemical grade limestone" and metallurgical grade limestone" used in a 1951 statute we must determine whether in 1951 there was any common or commercial understanding of those terms. The question has been asked several times and answered in the negative (*Lehigh Port-*

land Cement Company v. *United States*, 198 F. Supp. 877, 61-2 USTC 9743; *Halquist* v. *Commissioner*, 33 T. C. 304, 321; also in *Wagner Quarries Company* v. *United States*, 164 F. Supp. 655 at 659), where the Court quoted the testimony of Dr. Bowles (a recognized authority in the field; since deceased) that chemical grade is a term Congress "dug up from somewhere that I don't know. It is not generally used." And stated that Dr. Kenneth Landes had been accredited with having asserted that in his appearances before the House Committee in 1949 and 1950 he had coined the phrases "chemical grade limestone and metallurgical grade limestone" although he denied that he should receive any credit for so doing.

While it may be that the yardstick of "common, commercial understanding" prescribed in the report of the Senate Finance Committee in 1951 has since been given judicial recognition, and while it is true that in individual cases that yardstick has been applied to a particular stone there in question, to determine whether it does or does not measure up, there is even yet no all inclusive definition of these terms. If Congress had just "dug up" the terms "chemical grade limestone" and "metallurgical grade limestone", if Dr. Landes (whether or not he "coined the words *for the benefit of Congress*") did use them at the hearings before the Ways and Means Committee which first used those terms in its draft of this statute, can it possibly be said that those terms had any "common, commercial understanding" in 1951, or that Congress intended them to mean anything but what its expert witness meant? And he meant by his own Grade B-1, and even grade B-2, high grade magnesium limestone (or by another name high grade dolomite) of the same approximate chemical content as Taxpayer's McCook and Racine Stone.

Fourth: The Court of Appeals erred in its conclusion "that taxpayer has jumped from an order of specificity

based on chemical content (that is, the type of carbonate which the stone contains) to one based on impurity content." Taxpayer does not contend Congress ever intended that the percentage of impurities in the stone should govern its *mineral* classification. Taxpayer contends that the percentage of impurities governs the *grade* classification.

That a *grade* classification is implicit in the statute is evidenced by use of the words chemical *grade* and metallurgical *grade* and by the format (i) 5% (ii) 10% and (iii) 15%. Congressional intent to establish a grade test has been recognized by the Courts. *Riddell v. Victorville Lime Rock*, 292 F. 2d 427 (C. A. 9th), *United States v. W. R. Bonsal*, Cir. 279, F. 2d 465, 467-9.

The smaller the percentage of impurities, therefore, the greater the carbonate content and the higher the *grade* of the mineral. Absence of more than a small percentage of impurities necessarily means that the stone is a very nearly pure mineral—in the case of McCook and Racine, high grade, high purity, chemical and metallurgical grade limestone.

Properly construed, the language of the Conference Committee Report (Appendix C, page 39) that the specific classification should control over the more general classification, is further evidence that Congress intended to establish a grade test. The question in this case is "which is the more specific classification?" The Government says "dolomite" is the more specific. That would be true if the comparison were simply between "dolomite" and "limestone" because "dolomite" being magnesian limestone, is more specific than "limestone" which can be *either* calcium *or* magnesian. "Limestone" as such does not appear in the statute, yet "limestone" is the most commonly understood and commonly used term. Nobody quotes or orders "calcium carbonates" or "magnesium carbonates", which appear in the same classification with "dolo-

mite" (ii). Both are other names for "limestone", and "magnesium carbonates" is also another name for "dolomite". Only with the application of a *grade* test can we arrive at the true meaning and intent of Congress that classification (iii) chemical grade limestone and metallurgical grade limestone, is the most specific classification. On that construction the very highest grade dolomite (or magnesium carbonates, or magnesium limestone,—the terms mean the same) would be entitled to the 15% rate of depletion, while that which contains more impurities (non-carbonate content) would be entitled to the 10% rate.

(Taken from Rev. Rul. 55-700) There is no clear line of distinction between limestone and dolomite as one grades into the other in relation to the amount of magnesium that it contains. It seems improbable that Congress intended to limit the term "dolomite" to the pure mineral, dolomite as distinguished from dolomite used in commerce. Congress manifestly did not intend to classify a limestone as dolomite merely because it contains some magnesium. "If the latter were intended, limestone relatively high in magnesium content and used in the production of metals would be denied the 15 per cent rate of depletion allowed for 'metallurgical grade limestone' and would be limited to 10% depletion as 'dolomite' or magnesite.'" Dr. William E. Ham, testifying for the Government (Appellant's Appendix 109) agrees that geologically and industrially it does not make sense to exclude high grade dolomite from the 15% classification, chemical and metallurgical grade limestone. "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with legislative purpose." (*Hanna* v. *Helvering*, 308 U.S. 389, 395).

CONCLUSION

It is submitted that a sufficient number of cases remain pending to require a decision of this Court as to whether a high grade, high magnesium stone—dolomite or dolomitic limestone—actually used for chemical and metallurgical purposes was intended by Congress to be included within the broad statutory language "chemical and metallurgical grade limestone".

Respectfully submitted,

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APPENDIX A.

OPINION BELOW.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit.

No. 13565 SEPTEMBER TERM, 1961 APRIL SESSION, 1962

VULCAN MATERIALS COMPANY,
Plaintiff-Appellant,
vs.
ERNEST J. SAUBER, DISTRICT DIRECTOR OF INTERNAL REVENUE and D. J. LUPPOLD, ACTING DISTRICT DIRECTOR OF INTERNAL REVENUE,
Defendant-Appellee.

On appeal from the Judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

June 25, 1962

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This is an appeal from a decision of the District Court denying a refund of income taxes paid under protest pursuant to deficiency assessments of the Director of Internal Revenue for the years 1951 and 1952 against taxpayer,[1] Vulcan Materials Company, a New Jersey corporation doing business in Illi-

1. Prior to this suit, original taxpayer, Consumers Company, had merged with Union Chemical & Materials Corporation, which in turn became merged into Vulcan Materials Company.

nois. During these years taxpayer owned and operated stone quarries at three locations, one near Racine, Wisconsin, one at McCook, Illinois, and the third at Bellwood, Illinois.

The question presented concerns the proper depletion rates to be allowed taxpayer for the stone quarried at these locations. The applicable statute is Section 114 (b)(4)(A) of the Internal Revenue Code of 1939, 26 U.S.C. § 114(b)(4)(A), as amended by the Revenue Acts of 1942 and 1951.[2]

In the proceeding in the District Court the parties stipulated that the chemical analysis of the stone from each of the quarries for the years in question reveals the following mineral content:

	McCook	Racine	Bellwood
Magnesium carbonate	43%	43%	40%
Calcium carbonate	55%	55%	53%
Impurities	2%	2%	7%

It was also stipulated that the stone from all the quarries was dolomite and that the McCook and Racine stone was commonly known as such; further, that the stone from these two quarries was suitable for use in the chemical and metallurgical industries, but that the stone from the Bellwood quarry was not.

In its income tax returns for the years 1951 and 1952 taxpayer claimed a depletion deduction of 15% of all

2. Section 114(b)(4)(A) provides in part that the allowance for depletion shall be:

"(i) in the case of . . . stone . . . 5 per centum,

(ii) in the case of . . . dolomite, magnesite, . . . calcium carbonates, and magnesium carbonates, 10 per centum,

(iii) in the case of . . . metallurgical grade limestone, chemical grade limestone . . . 15 per centum . . . of the gross income from the property during the taxable year . . . ."

sales from the three quarries. The District Director upon an audit of the returns allowed depletion rates of 15%, 10%, and 5% depending upon the actual use to which the quarried stone was put.

The amount of the refund requested by taxpayer was $383,341.67. The District Court determined (1) that the District Director improperly employed the "end use" test in computing the assessments,[3] and (2) that instead of a 15% depletion allowance claimed by taxpayer, it was entitled to a 10% allowance on the sales from the McCook and Racine quarries based on its finding that the stone from these quarries was dolomite and not chemical or metallurgical limestone, and a 5% allowance on the sales from the Bellwood quarry based on its finding that the stone from this quarry was stone and not dolomite. As a result of these determinations the court allowed a partial refund in the amount of $100,210.11. Taxpayer appeals from the denial of a larger refund, claiming that in addition to the amount allowed by the District Court it is entitled to an amount to be computed on the basis of a 10% depletion allowance on the Bellwood sales and a 15% allowance on the McCook and Racine sales.

Both in its tax returns and in the proceeding in the District Court, taxpayer claimed that the stone from all three quarries met the requirements of metallurgical grade limestone, thereby entitling it to a 15% depletion allowance. It now concedes, however, that the stone from the Bellwood quarry does not meet the requirements of metallurgical grade limestone, but does claim that this stone is dolomite, thereby entitling it to a 10% allowance.

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3. The government conceded that a portion of the assessment attributable to the employment of the "end use" test was refundable under the holding in *Virginian Limestone Corp.* v. *Commissioner*, 26 T. C. 553.

I.

The District Court found that the commonly understood commercial meaning of dolomite is a stone containing no more than 5% impurities and at least 40% magnesium carbonate; that chemical and metallurgical grade limestone is a stone of relatively high calcium carbonate content; and that the stone taken from the McCook and Racine quarries was commercially understood to be dolomite. The court therefore concluded that this stone should be classified as dolomite under paragraph (ii) of Section 114(b)(4)(A) rather than as chemical or metallurgical limestone under paragraph (iii) of the Section.

Taxpayer contends that the District Court erred in ruling that the mineral terms enumerated in Section 114 (b)(4)(A) should be given their commonly understood commercial meaning. It also contends that since it was stipulated that the stone from the McCook and Racine quarries is suitable for use in the chemical and metallurgical industries and since some of the product from these quarries was so used,[4] all of its stone from these quarries should be classified as metallurgical grade limestone.

Taxpayer's contention that the court erred in ruling that the classification of the minerals listed in the statute is governed by their commonly understood commercial meaning cannot be sustained. It is true that the statute contains no definitions of the mineral terms therein listed. Its legislative history, however, indicates the meaning which Congress intended to attach to them. The Senate Finance Committee[5] which added the provisions now con-

4. 35% of McCook in 1951, 24.3% in 1952; 12.75% of Racine in 1951, 7.3% in 1952.

5. S. Rep. No. 781, 82d Cong. 1st Sess., p. 38; 2 U. S. Code, Cong. and Adm'n. Service, 2006, 2008.

tained in paragraphs (i), (ii), and (iii) of Section 114 (b)(4)(A) stated in its report, "The names of all the various enumerated minerals are of course intended to have their commonly understood commercial meaning." Not only is the commonly understood commercial meaning test supported by this legislative history, but it has also been given judicial approval in *Erie Stone Co.* v. *United States*, 6 Cir., ___ F. 2d ___, *Blue Ridge Stone Corp.* v. *United States*, 170 F. Supp. 569, and *Virginian Limestone Corp.* v. *Commissioner*, 26 T. C. 553.

On this basis alone, we would be justified in ruling against taxpayer's claim that the stone quarried from its McCook and Racine quarries was metallurgical grade limestone, since it was stipulated "[t]hat the stone in all the quarries involved in this proceeding was dolomite and in the McCook and Racine Quarries *was commonly known as such.*" [Emphasis supplied].

We need not, however, rest our decision on the stipulation and its interpretation, and believe we should not do so because of an additional contention advanced by taxpayer. That contention is this: Limestones are divided into two broad classifications, calcium carbonates and magnesium carbonates; when the content of magesium carbonate predominates, the stone is known as dolomite; the term dolomite, being a particular kind of limestone, is a more specific term than limestone; calcium carbonate limestone and magnesium carbonate limestone (dolomite) range "in grade" from large amounts of impurities to almost no impurities; there is no common commercial understanding of the term "metallurgical grade limestone;" this term, however, is more specific than the term dolomite because it refers to a high purity carbonate stone suitable for use in the metallurgical industry; since dolomite is only a specific kind of limestone, if a magnesium carbonate limestone (dolomite) meets the test of being

suitable for use in metallurgical industry, it becomes a metallurgical limestone and thus is a more specific term than dolomite; the metallurgical industry requires fluxing materials of two kinds, limestone as such and dolomite, provided the impurities are less than 5%; the stone taken from the McCook and Racine quarries contains only 2% impurities and was suitable for use in the metallurgical industry; therefore, taxpayer concludes that the stone sold from these two quarries was actually metallurgical grade limestone which entitles it to a 15% depletion allowance.

The District Court found that the commonly understood commercial meaning of dolomite is a stone containing at least 40% magnesium carbonate. It further found that "[d]olomite and chemical or metallurgical grade limestone are separate and distinct rocks. Such limestone is commercially understood to be a high grade calcium carbonate stone, whereas dolomite is known commercially for its high magnesium carbonate content," and that the stone quarried from the McCook and Racine quarries was commercially understood to be dolomite. The evidence supports these findings, although the testimony of the witnesses is conflicting in many respects.

There is evidence to the effect that while it is true that the term "limestone" in its broader sense includes dolomite, yet the term "dolomite" has a definite commonly understood commercial meaning distinguishable from what is meant by "limestone," and that the essential distinguishing characteristic of dolomite is its high magnesium carbonate content, whereas the essential distinguishing characteristic of limestone is its high calcium carbonate content.

Several witnesses from the steel industry testified for the government. Their testimony is to the effect that the common understanding of the term dolomite is a high magnesium stone whereas limestone has a high cal-

cium base; that dolomite and limestone are not the same; and that there is a definite distinction between limestone and dolomite.

The testimony of the scientific witnesses is also to the effect that those who use quarried stone for industrial purposes draw a distinction between the terms "dolomite" and "limestone." For example, one witness testified that limestone of high calcium content and dolomite have different uses; that either limestone or dolomite with more than 5% impurities is not preferably suitable for industry; and that when the magnesium compounds industry orders dolomite with no more than 5% impurities, it knows what it is getting, whereas if it ordered limestone of no more than 5% impurities, it might not get dolomite.

Another scientific witness, called by the taxpayer, testified as follows:

> ". . . I admit that it [dolomite] is allied to limestones, and that it is a carbonate rock the same as limestone, and that in the broadest sense dolomite can be a kind of limestone, but it is not sufficiently exclusive. Dolomite is a much more specific term than 'limestone.'"

This witness further testified that high grade dolomite which is suitable for chemical and metallurgical uses is not a chemical or metallurgical grade limestone.

We believe the testimony of the witnesses establishes that dolomite is commercially known as a stone with a relatively high magnesium carbonate content and thus, is a more specific term than limestone which in its broader sense may be used to embrace all other carbonate stone.

Taxpayer concedes that dolomite is a more specific term than limestone (used in its broader sense) and that Congress intended that when a mineral is specifically provided for at a stated rate of depletion allowance, the specific provision will govern over the allowance provided

for the more general classification.[6] As heretofore detailed, taxpayer goes a step further, however, and contends that metallurgical grade limestone is a more specific term than either limestone or dolomite since to qualify as a metallurigcal limestone the stone must contain less than 5% impurities. Taxpayer has failed to persuade us that this contention is sound.

The trouble with the contention is that taxpayer has jumped from an order of specificity based on chemical content (that is, the type of carbonate which the stone contains) to one based on impurity content. We find it unreasonable to believe Congress intended that the percentage of impurities in the stone should govern its mineral classification, and we have found no evidence that such was the intent of Congress. If taxpayer's argument were valid, then certainly Congress would have provided a classification for chemical or metallurgical grade dolomite to cover situations such as we have here, where dolomite is sufficiently pure to be suitable for use in the metallurgical industry. Since Congress did not provide for this classification we believe that the specific provision provided for dolomite sets the upper limit for the percentage depletion allowance for that stone. We agree with the reasoning of the court in *Halquist* v. *Commissioner*, 33 T. C. 304, 322, reversed on another issue, 7 Cir., 291 F. 2d 49, where the court held:

> "We do not believe it is within our province to assume that Congress intended to include a high-grade dolomite within the classification chemical or metallurgical grade limestone when it specifically granted a 10 per cent rate to dolomite. This would be true even if we accept petitioners' contention that the term 'limestone' is commonly understood to include dolomite and that dolomite with a combined carbonate content

6. H. Conference Rep. No. 1213, 82d Cong., 1st Sess., p. 77; 2 U. S. Code, Cong. and Adm'n. Service, 2121, 2133.

> of 95 per cent would qualify as a chemical or metallurgical grade limestone. Absent some evidence that Congress intended the latter phraseology to encompass high grade dolomite and thus overlap the term 'dolomite' specifically used in the 10 per cent category, we will apply the concept stated in the conference report quoted above that when a 10 per cent rate was specifically provided for dolomite, that rate shall apply to all dolomite, whether it could also be classified as stone entitled to a 5 per cent rate, as argued by respondent in *Virginian Limestone Corporation, supra*, or as chemical or metallurgical grade limestone entitled to a 15 per cent rate, as argued by petitioners here."

Consequently, we hold that the stone from the McCook and Racine quarries was dolomite, was commonly known as such, and was entitled to no more than the 10% depletion allowance which was properly allotted to the stone by the District Court.

II.

Turning to the issue whether the Bellwood quarry stone is entitled to a 5% depletion rate as stone or to a 10% rate as dolomite, we believe that the District Court erred in not allowing the 10% rate. The court's basic finding on this issue is that, "The commonly understood commercial meaning of dolomite, is a stone containing no more than 5% impurities. . . ." We believe that this finding is clearly erroneous.

The District Court found that in order to qualify as dolomite within the commonly understood meaning of the term, the stone must contain at least 40% magnesium carbonate. The Bellwood stone contained this exact percentage of magnesium carbonate, and it was stipulated that the stone was dolomite. It was further stipulated, however, that the Bellwood stone contained 7% impurities

and because of this amount of impurities the government contended and the court found, that although this stone was dolomite, it was not such within its commonly understood commercial meaning.

The government's contention is untenable because it is based on the same faulty reasoning that caused taxpayer's contention to be untenable with regard to the McCook and Racine stone. The government attempts to classify dolomite based on its impurity content rather than on its chemical content despite the overwhelming evidence from the scientific literature and witnesses that a carbonate stone is dolomite if it contains a high percentage of magnesium carbonate.

Four of the government's six witnesses were from the steel industry and all of the government's testimony concerning the effect of impurities on the commercial meaning of dolomite was to the effect that *in the chemical and metallurgical industries* no stone with more than 5% impurities is known as dolomite. It was logical, of course, in establishing that the McCook and Racine stone was not commercially known as chemical or metallurgical grade limestone, that the only government witnesses from industry were from the steel industry because the metallurgical industry would have the best knowledge of the commercial meaning of metallurgical grade limestone. This testimony is not conclusive, however, to the determination whether the Bellwood stone was commercially known as dolomite.

The evidence also shows that the Bellwood stone was used to a sizeable extent as agricultural stone and groundstone, to which uses, according to the scientific literature introduced in evidence, dolomite is adaptable. While it is true that the "end use" test has been consistently rejected by the courts since *Virginian Limestone Corp., supra*, it would be unrealistic and illogical not to consider the com-

mercial adaptability of the Bellwood stone as its adaptability is indicated by its actual usage. In this regard we are in accord with the following statement of Judge Laramore, speaking for the Court of Claims in *H. Frazier Co., Inc. v. United States*, F. Supp.

> "To classify minerals solely by their end use is one thing, to reach a reasonable interpretation of what Congress intended is another, even though the latter may be shaped and influenced in some degree by the potential use."

That the Bellwood stone was dolomite as that term is commercially understood, is supported by the decisions of other courts which have dealt with this problem. In *Blue Ridge Stone Corp. v. United States*, *supra*, the court said:

> "There are certain uses of dolomite for which only dolomite of a particular degree of purity can qualify. Such would be use as a refractory, as a dead-burn flux, and as a source of magnesium. It is, however, a fact that only a small per cent of all the dolomite quarried is used for these purposes, while most of it is used in the construction industry as rip-rap, ballast, or concrete aggregate. In writing the statute providing for the depletion allowance, Congress did not see fit to limit the term dolomite to dolomite of any particular degree of purity.
>
> "The plaintiff's product does not measure up to the high standard of purity required for use as a refractory. However, the term 'dolomite' has come to have the same commonly accepted meaning in commerce and in industry as it has among geologists. . . ."

In *Erie Stone Co. v. United States*, *supra*, Judge McAllister, speaking for the court, said:

> "Dolomite, standing alone, may be a 'high grade dolomite' a term used by the District Court in its opinion, —or a 'low grade dolomite.' If it is a 'high grade'

dolomite, it could be used as a fluxstone in a blast furnace in the manufacture of steel; if a low grade dolomite, it could not be used for such a purpose. Some dolomites can be used for chemical purposes; others cannot be. Moreover, dolomites are classified as: (1) argillaceous (clay) dolomite; (2) siliceous (silica) dolomite; (3) arenaceous (sandy) dolomite; and (4) cherty dolomite. Dolomites are often called magnesian limestones or dolomitic limestones, dependent upon the magnesian carbonate content. Many dolomites are marbles, and are entitled to only a 5% depletion allowance, although dolomite which is not a marble, is entitled to a 10% depletion allowance, according to the statute. . . ."

Judge Weick, concurring with Judge McAllister that the No. 63 stone should be classified as dolomite with a 10% depletion allowance, stated:

"No. 63 stone which contained carbonates of 61.05 per cent was classified by the District Court, not as dolomite, but as stone and held entitled to the lowest depletion allowance of 5%. In my judgment, since this stone contained more than 50% of the mineral dolomite, it was entitled to a classification as dolomite with a 10% depletion. *Blue Ridge Stone Corp.* v. *United States*, 170 F. Supp. 569 (D. C. Va., 1959).

"The fact that the stone contained impurities of 38.25% means simply that it is a low grade dolomite. The statute does not distinguish between high and low grade dolomite. Either grade is entitled to a 10% depletion allowance."

We are in particular agreement with Judge Weick's views in regard to the irrelevancy of the amount of impurities contained in a stone which is otherwise dolomite according to the recognized scientific and commercially accepted tests.

Accordingly, we hold that the Bellwood stone should be classified as dolomite and allowed a 10% depletion rate.

The judgment of the District Court is affirmed in part and reversed in part, and the proceeding is remanded for the purpose of entering judgment consistent with this opinion.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago 16, Illinois,
Friday, July 27, 1962.

Before:
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge.

VULCAN MATERIALS COMPANY, *Plaintiff-Appellant,* vs. ERNEST J. SAUBER, as District Director, etc., et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 13565	

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

STATUTES INVOLVED

(26 U. S. C. 23(m) and 114 (b)(4)(A) 1952 ed.)

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions.

* * * * * *

"(m) Depletion.—In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such rea-

sonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *

"For percentage depletion allowable under this subsection, see section 114(b), (3) and (4).

* * * * * * *

"SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * * * *

"(b) Basis for Depletion

* * * * * * *

"(4) Percentage Depletion for Coal and Metal Mines and for Certain Other Mines and Natural Mineral Deposits.

"(A) In General.—The allowance for depletion under section 23(m) in the case of the following mines and other natural deposits shall be—

"(i) in the case of sand, gravel, slate, stone (including pumice and scoria), brick and tile clay, shale, oyster shell, clam shell, granite, marble, sodium chloride, and, if from brine wells, calcium chloride, magnesium chloride and bromine, 5 per centum,

"(ii) in the case of coal, asbestos, brucite, dolomite, magnesite, perlite, wollastonite, calcium carbonates, and magnesium carbonates, 10 per centum,

"(iii) in the case of metal mines, apatite, bauxite, fluorspar, flake graphite, vermiculite, beryl, garnet, feldspar, mica, talc (including pyrophyllite), lepidolite, spodumene, barite, ball clay, sagger clay, china clay, phosphate rock, rock asphalt, trona, bentonite, gilsonite, thenardite, borax, fuller's earth, tripoli, refractory and fire clay, quartzite, diatomaceous earth, metallurgical grade limestone, chemical grade limestone, and potash, 15 per centum, and

"(iv) in the case of sulfur, 23 per centum,

of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect to the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23(m) be less than it would be if computed without reference to this paragraph."

APPENDIX B.

REGULATIONS INVOLVED.

T. D. 6031.

REGULATIONS 111.

Paragraph 1. Section 29.23(m)-1(f), as amended by Treasury Decision 6021, approved June 18, 1953 [26 CFR 29.23(m)-1(f)], is further amended as follows:

Calcium carbonates	Miscellaneous limestones and other calcium carbonate rocks (not specifically provided for at a 5 percent or 15 percent rate of percentage allowance) such as cement rock and limestone used or sold for use in soil treatment. This classification does not include rock or minerals used or sold for use as ballast, road making, concrete aggregates, or other purposes for which chemical composition is not a major requirement.
Limestone, chemical grade	Limestone used or sold for use in the chemical trades.
Limestone, metallurgical grade	Limestone used or sold for use in the production of metals.

T.D. 6510.

filed with the Federal Register on December 1, 1960

On February 10, 1959, notice of proposed rule making regarding amendments to Regulations 118 (26 CFR (1939) Part 39) and Regulations 111 (26 CFR (1939) Part 29) with respect to definitions of certain minerals was published in the Federal Register (24 F. R. 975). After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, the following amendments are hereby adopted:

REGULATIONS 118.

Paragraph 1. Paragraph (b) of § 39.23(m)-5 is amended

(B) By striking the term "Calcium carbonates" and the definition of such term and inserting in lieu thereof the following:

Calcium carbonates—Miscellaneous limestones and other calcium carbonate rocks (not specifically provided for at a 5 percent or 15 percent rate of percentage allowance) which are used or sold for use for purposes for which the calcium carbonate content is a major requirement. For example, the term "calcium carbonates" includes limestone which is not of chemical or metallurgical grade and which is used or sold for use for cement manufacture or soil treatment. However, the term "calcium carbonates" does not include any carbonate mineral which is identifiable as dolomite, marble, stone, oyster shells, or clam shells within the commonly understood commercial meaning of those terms.

(D) By striking the terms "Limestone, chemical grade" and "Limestone, metallurgical grade" and the definitions of such terms and inserting in lieu thereof the following:

Dolomite—Any carbonate rock which contains substantial amounts of the mineral dolomite and which is con-

sidered to be dolomite within the commonly understood commercial meaning of the term.

Limestone, chemical and metallurgical grade—Limestone which contains a calcium carbonate and magnesium carbonate content totaling 95 percent or higher by weight. For this purpose, the term "limestone" does not include any carbonate mineral which is identifiable as a mineral falling within a more specific classification such as dolomite, marble, oyster shells, or clam shells.

• • • • •

REGULATIONS 111.

Par. 2. The second undesignated paragraph of § 29.23 (m)-5, as amended by Treasury Decision 6031, approved July 14, 1953, is further amended—

• • • • •

(B) By striking the term "Calcium carbonates" and the definition of such term and inserting in lieu thereof the following:

Calcium carbonates—Miscellaneous limestones and other calcium carbonate rocks (not specifically provided for at a 5 percent or 15 percent rate of percentage allowance) which are used or sold for use for purposes for which the calcium carbonate content is a major requirement. For example, the term "calcium carbonates" includes limestone which is not of chemical or metallurgical grade and which is used or sold for use for cement manufacture or soil treatment. However, the term "calcium carbonates" does not include any carbonate mineral which is identifiable as dolomite, marble, stone, oyster shells, or clam shells within the commonly understood commercial meaning of those terms.

• • • • •

(D) By striking the terms "Limestone, chemical grade" and "Limestone, metallurgical grade" and the definitions of such terms and inserting in lieu thereof the following:

Dolomite—Any carbonate rock which contains substantial amounts of the mineral dolomite and which is considered to be dolomite within the commonly understood commercial meaning of the term.

Limestone, chemical and metallurgical grade—Limestone which contains a calcium carbonate and magnesium carbonate content totaling 95 percent or hi her by weight. For this purpose, the term "limestone" does not include any carbonate mineral which is identifiable as a mineral falling within a more specific classification such as dolomite, marble, oyster shells, or clam shells.

(Rev. Rul. 57-288.)

The interpretation by the court in the *Virginian Limestone* case, that the percentage allowance for dolomite is specifically prescribed for in Section 114(b) of the 1939 Code, obviates the necessity of applying the end-use test. *Accordingly, it is now recognized by the Service that a calcium magnesium carbonate of the composition determined by the Tax Court of the United States to be dolomite is entitled to the rate specified in Section 114(b)(4) of the 1939 Code, irrespective of its use.*

In view of the above, Revenue Ruling 55-700, C. B. 1955-2, 569 is modified to the extent that any limestone rock which has a *magnesium carbonate content of 35 percent or higher* shall be *designated as dolomite* and entitled to percentage depletion at a flat rate of ten percent irrespective of its use. Any limestone rock which does not contain magnesium carbonates, in accordance with the foregoing specification, will continue to be classified on the basis of the end-use test as set forth in Revenue Ruling 55-700, *supra*. Revenue Ruling 56-582, C. B. 1956-2, 981, to the extent that it refers to dolomite is also modified. (Emphasis supplied.)

APPENDIX C.

EXTRACTS FROM SENATE FINANCE COMMITTEE REPORT ON THE REVENUE BILL OF 1951.

(Senate Report 781), To Accompany H. R. 4473. (Copied from "U. S. Code Congressional and Administrative Service," 82nd Congress, First Session, 1951, pages 2007-2008.)

"The House bill added to the list of nonmetallic minerals, to which percentage depletion is available at a 15-percent rate, borax, fuller's earth, tripoli, refractory and fire clay, quartzite, perlite, diatomaceous earth, and metallurgical and chemical grade limestones. Your committee's bill, on the other hand, provides that these items added by the House are to receive percentage depletion at the same 10-percent rate accorded coal and asbestos. In addition to these items, your committee has added a 10-percent rate for wollastonite, which is important as an insulating and fireproofing material and thus competitive with other items presently accorded similar treatment, and the magnesium compounds magnesite, dolomite, and brucite.

* * * * *

"The names of all the various enumerated minerals are of course intended to have their commonly understood commercial meaning. For example, the term 'thenardite' applies to sodium sulphate, also known as salt cake; the term 'trona' to sodium carbonate and sodium bicarbonate, also known as soda ash; and the term 'borax' to boron minerals generally."

* * * * *

EXTRACT FROM CONFERENCE REPORT ON PROPOSED ACT OF 1951, H. R. 1179, 82ND CONGRESS, 1ST SESSION, TO ACCOMPANY H. R. 4473.

(Copied from statement of the managers on the part of the House [U. S. Code Congressional and Administrative Service, Volume 2, 82nd Congress, First Session 1951, pages 2132-2133.)

"Under the conference agreement calcium carbonates are granted an allowance of 10 percent, while marble, which is a calcium carbonate, receives 5 percent. It is intended, in any case where a mineral is specifically provided for at a stated rate of percentage allowance, that the specific provision will govern over the allowance provided (whether higher or lower) for a more general classification."

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In the Supreme Court of the United States

October Term, 1962

VULCAN MATERIALS COMPANY, PETITIONER

v.

ROBERT J. LARSEN, DISTRICT DIRECTOR OF INTERNAL REVENUE and D. J. LUNSFORD, ACTING DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1962

No. 486

VULCAN MATERIALS COMPANY, PETITIONER

v.

ERNEST J. SAUBER, DISTRICT DIRECTOR OF INTERNAL REVENUE and D. J. LUIPPOLD, ACTING DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question in this case is whether the court below correctly held that, for percentage depletion purposes, two of the taxpayer's mineral deposits are "dolomite" rather than "chemical grade limestone" or "metallurgical grade limestone." Section 114(b)(4)(A) of the Internal Revenue Code of 1939 provides in part that the allowance for depletion shall be:

"(i) in the case of * * * stone * * * 5 per centum,
(ii) in the case of * * * dolomite, magnesite * * * calcium carbonates, and magnesium carbonates, 10 per centum,
(iii) in the case of * * * metallurgical grade limestone, chemical grade limestone * * * 15 per centum * * * of the gross income from the property during the taxable year * * * *"

Dolomite was added to the list of minerals subject to percentage depletion simultaneously with chemical and metallurigal grade limestone and several other minerals. See Section 319 of the Revenue Act of 1951, c. 521, 65 Stat. 452; S. Rep. No. 781, 82d Cong., 1st Sess., p. 38. In adding those minerals, Congress indicated that the mineral classifications were intended to have their "commonly understood commercial meaning" (S. Rep. No. 781, *supra*, p. 38; see, also, H. Conf. Rep. No. 1213, 82d Cong., 1st Sess., p. 77) and, recognizing that there was some overlapping in the statutory mineral classifications, that a specific classification should control over a more general classification (H. Conf. Rep. No. 1213, *supra*, p. 77).

In the trial court the taxpayer stipulated (R. 18) that the two deposits in issue contain 43 percent magnesium carbonate, that they are "dolomite," and that they are "commonly known as such." The taxpayer argued, however, that it is improper to classify the minerals listed in the statute according to their commonly understood commercial meanings. It also contended that the mineral deposits should be classi-

fied as chemical or metallurgical grade limestone because (1) "dolomite" is a "limestone" in the broad sense, although admittedly a more specific classification; and (2) this particular dolomite is of a grade suitable for chemical and metallurgical uses. The court below, sustaining the trial court, held (1) that the pertinent legislative history and judicial precedent establish that the listed minerals are to be given their commonly understood commercial meanings (Pet. 22-23); (2) that the evidence supports the trial court's findings that "dolomite" is commercially known as a stone with a high magnesium carbonate content, in contrast to "limestone" which is a term customarily used to embrace all other carbonate rock (Pet. 24-25); and (3) that, since "dolomite" is a more specific classification than "limestone" and since Congress has provided only a single depletion rate for dolomite regardless of whether or not it is suitable for chemical and metallurigal uses, the percentage rate of depletion for the taxpayer's mineral deposits is the 10 percent provided for "dolomite" (Pet. 25-27).

There is no occasion for further review of the case. The decision below is correct and in accord with the Sixth Circuit's recent opinion in a substantially identical case, *Erie Stone Co.* v. *United States*, 304 F. 2d 331, in which a petition for certiorari is pending (No. 388, October Term, 1962). There is no conflict * and

* The taxpayer asserts (Pet. 6) that the decision below is in conflict with the Sixth Circuit's opinion in *United States* v. *Wagner Quarries Co.*, 260 F. 2d 907. In *Erie Stone Co.* v. *United States*, *supra*, a case substantially

the issue does not arise under the 1954 Code, since Section 613(b)(6) prescribes the same percentage rates of depletion, dependent upon the purpose for which the mineral is sold or used, for both dolomite and limestone of all grades.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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OCTOBER 1962.

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identical to the present one, the Sixth Circuit itself found no conflict with *Wagner Quarries*. The District Court's opinion in *Erie Stone*, 181 F. Supp. 942 (N. D. Ohio), fully explains the difference between *Wagner Quarries* and the present case.

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